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No. 96-431

In the Supreme Court of the United States

OCTOBER TERM, 1996

BLUE DIAMOND COAL COMPANY,
Petitioner,
v.
SHIRLEY S. CHATER, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT TRUSTEES OF THE UMWA COMBINED BENEFIT FUND IN OPPOSITION

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QUESTION PRESENTED

In the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, Congress determined that each employer that voluntarily participated in the collectively bargained multiemployer health care system for active and retired miners in the coal industry and whose former employees were still receiving benefits from that system, should, beginning on February 1, 1993, pay the future health care costs of the retired employees and dependents assigned to that employer by the Secretary of Health and Human Services under the criteria set forth in the statute.

The question presented is whether the Coal Act, as applied to petitioner, violates the Takings Clause of the Fifth Amendment.

LIST OF PARTIES

The caption of the petition lists all of the parties to the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 79 F.3d 516. The opinion of the district court (Pet. App. 23a-37a) is reported at 174 B.R. 722.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), which was enacted as part of the Energy Policy Act of 1992, Pub. L. No. 102-456, 106 Stat. 2776, 3036-3056. The Coal Act added a new Subtitle J, "Coal Industry Health Benefits," to the Internal Revenue Code. Subtitle J is codified at 26 U.S.C. §§ 9701-9722. The statute

also amended the Surface Mining Control and Reclamation Act of 1977 (the "Surface Mining Act"). Those amendments are codified in principal part in 30 U.S.C. § 1232(h). The congressional "Findings and Declaration of Policy," which appear at the beginning of the Coal Act, and 26 U.S.C. §§ 9701-9708 are reproduced in Appendix D to the petition, Pet. App. 39a-70a.

STATEMENT OF THE CASE

Petitioner presents a misleading and distorted account of the origins of the Coal Act, the problem that Congress sought to address, the nature of the legislative solution, and the rationale for the congressional action. Petitioner bases its entire argument on one ground—that it never made an express promise of lifetime benefits to its miners. As both the district court and the court of appeals held, however, this argument is unavailing. First, as the district court explained, "the actual Congressional finding which is mentioned in the legislation is not that Blue Diamond and others like it had actually *promised* benefits but that they bore 'responsibility' for the 'plan liabilities.' There is no doubt that, to some extent, they did." Pet. App. 30a (emphasis in original). Moreover, as the court of appeals ruled "[t]he fact that Blue Diamond never explicitly promised its employees lifetime benefits and never signed an NBCWA that contained an explicit promise of lifetime benefits is not dispositive, because Congress's power to regulate is not limited by the terms of private contracts." Pet. App. 14a.

To put the Coal Act and the present dispute in its proper context, we first review the nearly 50-year history of the UMWA Health & Retirement Funds, petitioner's substantial participation in those Funds, and the financial crisis that afflicted the Funds as petitioner and more and more employers like it discontinued their participation and left their former employees behind, either to receive no retiree health care at all or to obtain such care financed

by other employers. We then turn to the Coal Act itself and its legislative history, explaining the provisions of the statute, the reasons for the congressional intervention, and the basis for Congress's conclusion that the problem could not be solved through private collective bargaining. Finally, we summarize the decisions below and the grounds on which petitioner's constitutional challenges were rejected.

A. The UMWA Multiemployer Health and Retirement Funds

For more than forty years, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association, Inc. ("BCOA"), a multiemployer bargaining association representing various companies in the coal industry, have entered into a series of collective bargaining agreements known as National Bituminous Coal Wage Agreements ("NBCWAs"). Each NBCWA required signatory coal operators to pay contributions to finance health benefits for both active and retired miners and their dependents through multiemployer benefit plans. The origin of these plans was an historic agreement between the federal government and the UMWA.

1. *Establishment of the UMWA Multiemployer Health Care System*

The first coal industry multiemployer benefit plan was created in an agreement between the UMWA and the United States, in settlement of a national strike during which the federal government seized virtually all of the nation's coal mines. The dispute began when, during collective bargaining negotiations between the UMWA and the bituminous coal operators, the UMWA proposed that the parties create a health and welfare fund for its members. The employers rejected the proposal, and a strike ensued. In an effort to end the strike and avoid further disruption in the coal industry and elsewhere in the econ-

omy, President Truman issued Executive Order No. 9728 on May 21, 1946, directing Secretary of the Interior Julius Krug to seize the mines. The order also authorized Secretary Krug to negotiate with the UMWA for changes in the miners' terms and conditions of employment.

Those negotiations culminated in what is known as the Krug-Lewis Agreement. The Krug-Lewis Agreement created a multiemployer benefit plan called the United Mine Workers of America Welfare and Retirement Fund (the "1946 W&R Fund"). The 1946 W&R Fund was intended to provide various health and retirement benefits to UMWA miners and their dependents and survivors. In addition, under the Krug-Lewis Agreement, the federal government committed to conduct a comprehensive study of medical facilities and medical care in the nation's coal mining areas. At the request of Secretary Krug, that survey was conducted, and a report prepared, by Rear Admiral Joel T. Boone of the United States Navy Medical Corps.

In 1947, the UMWA and coal operators created a new multiemployer benefit plan known as the 1947 UMWA Welfare and Retirement Fund (the "1947 W&R Fund"), which succeeded to the assets and liabilities of the 1946 W&R Fund. Like its predecessor, the 1947 W&R Fund was created to make payments to UMWA miners and their dependents for a broad range of health and retirement benefits. By the end of December 1948, the 1947 W&R Fund had provided medical benefits and pensions to more than 250,000 coal miners and their families in 26 states.

In 1950, the UMWA and coal operators created a new multiemployer fund called the United Mine Workers of America Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"). The 1950 W&R Fund succeeded to the assets and liabilities of the 1947 W&R Fund. Like the 1946 W&R Fund and the 1947 W&R Fund, the 1950

W&R Fund was intended to provide pension and health benefits to UMWA miners and their dependents.[1]

In July 1950, building upon the 1947 W&R Fund's medical program, the 1950 W&R Fund introduced a comprehensive hospital and medical care program. The program included the payment of unlimited hospitalization and in-hospital medical care for the following classes of beneficiaries: working and unemployed miners; working and unemployed miners' wives and dependent children under age 18; retired miners and their wives; widows of deceased miners; and relatives of deceased miners who cared for the miners' orphaned children. The program's hospital and medical care coverage for miners' widows terminated only upon their remarriage.

During the 28 years of their existence, from 1946 to 1974, the 1950 W&R Fund and its predecessors provided comprehensive health care coverage to UMWA active and retired miners and their families. As such, the Funds had a significant impact on the economies of the bituminous coal producing states and the UMWA mining families that lived in those states. During this period, the 1950 W&R Fund and its predecessors collected approximately $3.9 billion in contributions from signatory coal operators, and paid approximately $1.5 billion in hospital and medical care benefits, $283 million in survivors and other

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[1] Employer contributions to the 1950 W&R Fund were not tax deductible until 1954, when Congress amended the Internal Revenue Code. Congress wrote the amendment in such a way that it effectively applied only to the 1950 W&R Fund. *See* 26 U.S.C. § 404(c). In recommending the amendment, the Senate Finance Committee emphasized that the fund was "established during a period of Government operation" and was "the result of an agreement between employee representatives and the United States Government during a period of Government seizure and operation of most of the facilities of the industry." S. Rep. No. 1622, 83d Cong., 2d Sess. 56 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4623, 4687. *See also* H.R. Rep. No. 2543, 83d Cong., 2d Sess. 43 (1954), *reprinted in* 1954 U.S.C.C.A.N. 5280, 5303.

related benefits, and approximately $2 billion in pension benefits.[2]

2. *The Establishment of the UMWA 1950 and 1974 Benefit Trusts*

The 1950 W&R Fund continued to provide health benefits through the term of the 1971 NBCWA, which ended in 1974. Under the 1974 NBCWA, however, partly in response to the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), BCOA and the UMWA agreed to divide the 1950 W&R Fund into four separate multiemployer plans.[3] Two of the four new plans provided pension benefits to retired miners. The other two plans provided health benefits to retired miners. One of the health benefit plans, known as the United Mine Workers of America 1950 Benefit Plan and Trust (the "1950 Benefit Trust"), provided health benefits to UMWA miners who retired before

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[2] Over the years, the 1950 W&R Fund from time to time increased, decreased, or suspended certain benefits. For example, on January 15, 1954, the 1950 W&R Fund limited the duration of hospital and medical coverage for widows, dependent children, and orphans of deceased miners to the twelve-month period during which a survivors benefit was paid on their behalf. On April 11, 1960, the 1950 W&R Fund imposed hospital and medical care eligibility restrictions for unemployed miners and miners disabled as a result of work-related injuries. On January 19, 1967, the eligibility for widows and dependent survivors of both working and retired miners was partially restored. Finally, on November 13, 1973, the 1950 W&R Fund restored the eligibility for hospital and medical care benefits for widows of miners killed in mine accidents and miners disabled as a result of work-related injuries. As had been the case before such eligibility was first limited in 1954, these beneficiaries' eligibility for hospital and medical benefits was restored for their lives or, in the case of surviving spouses, until they remarried.

[3] In 1974, Congress again enacted special provisions in the Internal Revenue Code to alleviate potential tax burdens that otherwise would have accompanied the restructuring of the 1950 W&R Fund. The rationale supporting these special provisions was the same as the one that supported the original enactment of Section 404(c) of the Internal Revenue Code twenty years earlier.

1976. The second plan, known as the United Mine Workers of America 1974 Benefit Plan and Trust (the "1974 Benefit Trust"), provided health benefits for miners who retired in 1976 or thereafter as well as for the active work force.[4]

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. The 1978 NBCWA continued the multiemployer approach for providing health benefits to persons who retired before January 1, 1976, but it provided that persons who retired on or after that date would receive their health benefits from single-employer plans maintained by the retirees' "last NBCWA signatory employer." The 1974 Benefit Trust was retained to provide health benefits on a multiemployer basis to those persons who retired on or after January 1, 1976 and whose last signatory employers were no longer in business (the so-called "orphan" retirees).

B. The Crisis That Threatened The UMWA Trusts' Beneficiaries And The Efforts To Resolve It

During the past decade, the problems that led to the 1978 restructuring of the collectively bargained multiemployer health care system became more acute and threatened the 1950 and 1974 Benefit Trusts' ability to continue providing health benefits to their beneficiaries. The uncertainty of continued health benefits for active and retired UMWA miners led to substantial labor strife in the

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[4] The UMWA multiemployer health and medical benefit plans, *i.e.*, the 1946 W&R Fund, 1947 W&R Fund, 1950 W&R Fund, and the 1950 and 1974 Benefit Trusts are collectively referred to herein as the "UMWA Trusts."

nation's bituminous coal mining regions and threatened the economies of several coal producing states.[5]

One of the most serious of these labor disputes was a ten-month strike by the UMWA against the Pittston Coal Company and its related entities. When collective bargaining failed to resolve the dispute, Secretary of Labor Elizabeth Dole intervened and appointed former Secretary of Labor William J. Usery as mediator. As part of the eventual settlement of the dispute, Secretary Dole established a special advisory commission called the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"). The Secretary authorized the Coal Commission to analyze the retiree health care crisis and recommend a solution. Former Secretary Usery was appointed Chair of the Coal Commission.

In November 1990, the Coal Commission submitted its findings and recommendations to Secretary Dole in a report entitled "Coal Commission Report: A Report to the Secretary of Labor and the American People."[6] In analyzing the health care crisis in the coal industry, the Coal Commission stated that ensuring the continued provision of health benefits to UMWA retirees and their dependents should be the primary objective of any proposed solution:

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[5] *See, e.g.*, 136 Cong. Rec. S12312 (statement of Senator Rockefeller) (daily ed. Oct. 2, 1989) ("the [UMWA health] funds contribute many millions of dollars to the West Virginia economy and sustain the efforts of many health care practitioners and organizations. If allowed to continue unchecked, the financial difficulties in the UMWA health funds could cripple health care delivery in West Virginia and in coal counties of states like Alabama, Arkansas, Colorado, Illinois, Indiana, Kentucky, Ohio, Pennsylvania, and Virginia").

[6] A copy of the Coal Commission Report was lodged with the Clerk of this Court when the respondent Trustees filed their brief in opposition to the petitions in Nos. 95-1709 and 95-1751 (*Davon* and *Templeton*), which were denied on October 7, 1996. The Report has been retained in the Clerk's correspondence file in No. 95-1709.

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

Coal Commission Report at 1. Recognizing the historical origins of the UMWA Trusts, the Coal Commission observed:

> The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

Id. at 29. The Coal Commission identified three developments, the combination of which "has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in a financial crisis." *Id.* at 2.

First, the Coal Commission found that "the number of coal companies making contributions to the Funds has declined significantly." Coal Commission Report at 2.[7] Second, it recognized the dramatic increase in the cost of health care between 1950 and 1990, stating that "[i]n the past 10 years alone, the total cost of [annual] health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million." *Id.* Finally, the Coal Commission noted the "steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits." *Id.*

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[7] The Coal Commission found that, while companies contributing to the UMWA multiemployer health benefit system in 1950 represented 80 percent of the coal produced in the nation, "by 1990, companies making contributions to the [UMWA Benefit Trusts] account[ed] for only 30 percent of national coal production." Coal Commission Report at 2.

In light of these facts and its finding that the 1950 and 1974 Benefit Trusts' funding bases were declining faster than their beneficiary populations, the Coal Commission predicted that the Benefit Trusts would have a combined estimated deficit of $300 million by 1993. *Id.* at 3.

The Coal Commission recognized that the collective bargaining process was inadequate to provide a long-term solution to the health care crisis, because, by its very nature, collective bargaining could only address those employers that were still mining coal and were still doing so with employees represented by the UMWA. Coal Commission Report at 3. The Commission therefore recommended two statutory approaches. Under the first approach, the Commission called for the creation of two new funds: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators to finance the health care of UMWA orphan retirees; and (2) a private multiemployer fund financed by signatories to the 1978 and later NBCWAs to provide health care to UMWA retirees whose last employer remained in business. *Id.* at 61-64. The second approach called for the creation of a single, private multiemployer plan to provide health benefits to UMWA retirees in the 1950 and 1974 Benefit Trusts, including the orphan retirees. *Id.* at 65-69. To produce the revenue that the first approach would have generated through an industry-wide tax, the second approach contained a financing scheme that imposed liability not just upon employers that signed the 1978 or a later NBCWA, but upon *all* employers and their related business entities that were, at one time, signatory to one or more NBCWAs:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts*, establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be iden-

> tified through a chain of succession to a current operator.

Id. at 65 (emphasis supplied); *see also id.* at 67.

C. The Congressional Solution To The Health Care Crisis In The Coal Industry—The Coal Act

Following the Coal Commission's Report, Congress undertook its own intensive examination of the subject. The Coal Act was the final product of those deliberations. In enacting the Coal Act, Congress found that:

> it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Pet. App. 39a. Congress further stated that the policy of the Coal Act is:

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Id.

In the Coal Act, Congress created two new trust funds for the provision of health care benefits to retired miners and their dependents. One of those funds, the UMWA Combined Benefit Fund (the "Combined Fund") is at issue here.[8] As the statute required, the 1950 and 1974 UMWA Benefit Trusts were merged into the Combined

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[8] The Coal Act also created the 1992 UMWA Benefit Plan ("1992 Plan"), an entirely new entity designed to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage directly from their former employers. *See* 26 U.S.C. § 9712.

Fund as of February 1, 1993. *See* 26 U.S.C. § 9702(a)(2). The Combined Fund now provides health and death benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Trusts. 26 U.S.C. § 9703(a), (b)(1), (e), (f).

In the Coal Act, Congress adopted a financing arrangement for the Combined Fund similar to the second approach recommended by the Coal Commission, under which only employers that were signatory to one or more NBCWAs are required to share the burden of financing health benefits for the affected retirees and their dependents. Each employer's annual liability to the Combined Fund is based on the number of beneficiaries that have been assigned to it by the Secretary of Health and Human Services in accordance with a specific list of priorities set forth in the statute.[9] *See* 26 U.S.C. § 9706. Under the detailed statutory criteria, the Secretary is required to place a higher assignment priority on post-1978 NBCWA signatories than on pre-1978 NBCWA signatories.[10] The

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[9] As of March 31, 1995, the responsibilities of the Secretary under the Coal Act were transferred to the Commissioner of Social Security. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 105(a)(1), (2)(A); 108(h)(9)(A), (B); 110(a), 108 Stat. 1472-73, 1487-88.

[10] Specifically, the assignment rules provide that the Secretary is first required to assign each retiree to the employer that was signatory to the 1978 NBCWA or any subsequent NBCWA and that most recently employed the retiree for at least two years. 26 U.S.C. § 9706(a). If the Secretary cannot assign a retiree to a coal operator pursuant to this first method, she is next required to assign the retiree to the coal operator that was signatory to the 1978 NBCWA or any subsequent NBCWA, and that employed the retiree most recently in the coal industry, without regard to the number of years of employment. Third, if she cannot assign a retiree to a coal operator pursuant to the first two methods, the Secretary is required to assign the retiree to the pre-1978 signatory operator that employed the retiree for the longest period of time. If the Secretary cannot identify any NBCWA signatory operator that remains in business (or that has a "related person" remaining

Coal Act also assigns to 1988 NBCWA signatories the financial responsibility for funding the start-up costs of the Combined Fund, 26 U.S.C. § 9704(i)(1)(A), and for eliminating any deficit of the 1950 and 1974 Benefit Trusts as of February 1, 1993, the termination date of the 1988 NBCWA and the date on which the Combined Fund began providing benefits under the statute, 26 U.S.C. § 9704(i)(1)(B).

D. Blue Diamond's Participation In The UMWA Trusts And Its Role In The Financial Crisis Leading To The Passage Of The Coal Act

Blue Diamond initially incorporated in Tennessee in 1915 and reincorporated in Delaware in 1922. *See Boggs v. Blue Diamond Coal Company*, 432 F. Supp. 19 (E.D. Tenn. 1977). Throughout its corporate existence, and continuing to the present day, Blue Diamond has mined bituminous coal, primarily in Kentucky and Tennessee. *Id.* at 23. Currently, Blue Diamond receives significant revenue from its production of more than two million tons of coal annually, primarily from sales contracts with utility companies, including Georgia Power, Orlando Public Utilities, and Central Illinois Light.

Blue Diamond's involvement with the collectively bargained multiemployer system for providing health care to retired UMWA miners and their dependents dates back to the system's very creation. Blue Diamond was actively and extensively engaged in bituminous coal mining in 1946, and for many years it employed UMWA-represented employees to generate profits from its business. From the time of the federal government's seizure of the nation's

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in business) and that formerly employed a particular retiree, the retiree is designated an "unassigned beneficiary," and his health benefits are financed by the statutory transfers of funds from the UMWA 1950 Pension Plan or the Abandoned Mine Reclamation Fund and, if necessary, by the assigned operators' payment of an unassigned beneficiaries premium. *See* 26 U.S.C. §§ 9704(d), 9705, 30 U.S.C. § 1232(h).

coal mines in 1946, Blue Diamond was one of the companies involved in providing health care to active and retired miners through a multiemployer plan. As such, it was also one of the original coal operators required to pay royalties to the 1946 W&R Fund.

Following the Krug-Lewis Agreement and the establishment of the 1946 W&R Fund, Blue Diamond continued to play an active role in the events that shaped the history of the UMWA multiemployer health benefit system. In particular, Blue Diamond was signatory to both the 1947 and 1950 NBCWAs, and to the February 1, 1951, October 1, 1952, September 1, 1955, October 1, 1956, and December 1, 1958 amendments to the 1950 NBCWA. Under these agreements, Blue Diamond paid royalties to the 1947 W&R Fund and the 1950 W&R Fund. During its years as a signatory to multiple coal wage agreements with the UMWA, Blue Diamond reaped economic benefits not only of the miners' labor but also of the maintenance of a stable available pool of skilled labor, which the UMWA multiemployer health care system encouraged and supported.

Blue Diamond continued its active participation in the multiemployer system for approximately eighteen years, until mid-1964. At that time, Blue Diamond succeeded, after a lengthy labor dispute, in refusing to sign further collective bargaining agreements with the UMWA. Blue Diamond ceased participating in the UMWA Trusts, and stopped paying contributions to them. The UMWA Trusts, however, continued to provide comprehensive health care benefits to petitioner's retirees. During the period after petitioner ceased to participate in the UMWA Trusts, and before the Coal Act became effective, these benefits were financed entirely by other coal companies.

As a result of Blue Diamond's extensive involvement in the coal industry and with the UMWA Trusts, a significant number of beneficiaries in the 1950 and 1974 Benefit

Trusts as of the time those Trusts were merged into the Combined Fund under the Coal Act were Blue Diamond retirees and their dependents. Accordingly, the Secretary assigned Blue Diamond approximately 1400 Combined Fund beneficiaries.[11] Until Congress intervened by passing the Coal Act, all of these beneficiaries had been receiving health care financed entirely by other employers. Indeed, as long ago as 1964, when Blue Diamond ceased participating in the 1950 W&R Fund, at least seventy-four of the beneficiaries that now have been assigned to it under the Coal Act were already receiving retiree health benefits. For more than twenty-eight years, these beneficiaries received comprehensive health and medical coverage from the UMWA Trusts that was financed entirely by employers other than Blue Diamond.

E. Blue Diamond's Constitutional Challenge To The Coal Act

In May 1993, Blue Diamond, a reorganized Chapter 11 debtor, filed an adversary proceeding in the Bankruptcy Court for the Eastern District of Tennessee seeking declaratory and injunctive relief barring the Trustees of the Combined Fund from enforcing the Coal Act. Blue Diamond alleged that the Act violates the Due Process and Takings Clauses of the Fifth Amendment. The district

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[11] Blue Diamond incorrectly states (Pet. 2) that its "first annual assessment under the Coal Act amounted to 4.9 million dollars." In fact, the assessment to which petitioner refers covered the Combined Fund's first two plan years, February 1 to September 30, 1993, and October 1, 1993 to September 30, 1994. *See* 26 U.S.C. § 9702(c). Because, as authorized by Section 9706 of the Coal Act, 26 U.S.C. § 9706, the Secretary did not complete the assignments of Combined Fund beneficiaries until approximately October 1, 1993, premiums for the Combined Fund's first two plan years were assessed and paid during the second plan year. *See* 26 U.S.C. § 9704(g). In the meantime, as stated above (page 13, *supra*), the 1988 NBCWA signatory operators were responsible for funding the Combined Fund's start-up costs during the first plan year. 26 U.S.C. § 9704(i)(1)(A).

court withdrew the reference of the adversary proceeding from the Bankruptcy Court and, on cross motions for summary judgment, upheld the constitutionality of the Coal Act in its entirety. The court ruled that Congress rationally chose "to spread the costs of the Combined Fund's benefits to those employers who had profited from the labor of UMWA miners and who, at some time in their histories, had contributed to multi-employer welfare benefit funds." Pet. App. 30a. The court also rejected petitioner's takings challenge, concluding that "Blue Diamond contributed to the problem and should be part of the solution" (*id.* at 35a) and that "[i]t would be unfair if the lifetime health costs of Blue Diamond's own retirees were to be born[e] by its competitors in the coal industry" (*id.* at 37a).

The court of appeals affirmed. Observing that "several federal courts have found that UMWA members had a legitimate expectation of lifetime benefits before the 1974 NBCWA" based on the long history of benefits from the UMWA Trusts, the court held that "Congress certainly had a rational basis for concluding that all NBCWA signatories and 'me-too' operators who agreed to be bound by the NBCWAs, including Blue Diamond, contributed toward the legitimate expectations of the UMWA members." Pet. App. 13a. The court likewise rejected petitioner's takings argument, ruling that "none of the significant factors in the Takings Clause inquiry favors Blue Diamond." *Id.* at 22a.

ARGUMENT

The decision of the court of appeals is correct, and review by this Court is not warranted. There is plainly no unresolved or controversial question of federal constitutional law presented here. Five panels of four courts of appeals (including the decision below) have unqualifiedly upheld the constitutionality of the Coal Act in the face of challenges like petitioner's. *See Lindsey Coal Mining Company Liquidating Trust v. Chater*, 90 F.3d 688 (3d

Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, Nos. 95-1709 and 95-1751 (Oct. 7, 1996); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995); *LTV Steel Company, Inc. v. Shalala*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995).

In addition, several district courts have held that the Coal Act comports fully with the Due Process and Takings Clauses of the Fifth Amendment. *See Lone Star Steel Company v. Chater, et al.*, Civ. No. 3:94-CV-652-R (N.D. Tex. Aug. 26, 1996); *Holland v. Eagle Coal & Dock Co.*, Civ. No. 2:94-0880 (S.D. W. Va. Mar. 8, 1996); *Holland v. High-Tech Collieries, Inc.*, 911 F. Supp. 1021 (N.D. W. Va. 1996); *Holland v. Imperial Colliery Co.*, Civ. No. 1:94-0793 (S.D. W. Va. Dec. 7, 1995); *Holland v. Milburn Colliery Co.*, Civ. No. 1:94-0801 (S.D. W. Va. Dec. 1, 1995); *Holland v. Keenan Trucking Co.*, Civ. No. 2:93-1223 (S.D. W. Va. Mar. 15, 1995), *appeal pending*, No. 96-1262 (4th Cir. argued Oct. 29, 1996). *But see Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818 (W.D. Pa. 1995) (order granting preliminary injunction in favor of related person alleging inability to pay) (motions for summary judgment pending).

There is no suggestion by petitioner that a conflict among the courts of appeals exists, or is even likely to occur in the future. As petitioner observes, the courts of appeals have uniformly sustained the constitutionality of the Coal Act. Pet. 8. Here, as in the earlier Coal Act cases in which this Court has denied review, the agreement among the courts of appeals and district courts, and the consistency of many rulings upholding the Coal Act with the precedents of this Court, militates strongly against further examination of the same legal arguments that have been rejected repeatedly without dissent in jurisdiction after jurisdiction.

I. BLUE DIAMOND'S ENTIRE ARGUMENT DEPENDS ON AN EXCESSIVELY NARROW VIEW OF WHAT CONGRESS MAY CONSIDER IN ENACTING ECONOMIC LEGISLATION.

The thrust of petitioner's argument is that the court of appeals (like the Seventh Circuit in *Davon* and the Third Circuit in *Lindsey*) "disregarded" the fact that petitioner was never a signatory to an NBCWA that contained an explicit promise of lifetime benefits and wrongly concluded that petitioner had helped to foster an expectation of lifetime benefits for retired miners. This argument is misguided, and relies entirely on an improperly restricted conception of what Congress and courts may consider in assessing the rationality of economic legislation.

The court of appeals expressly acknowledged and addressed Blue Diamond's argument that "only the coal mine operators who signed the 1974 NBCWA or later NBCWAs, promised lifetime health benefits." Pet. App. 9a. The Court provided two answers, each of which is dispositive.

First, like the *Davon* court before it, the court of appeals concluded that petitioner's undisputed participation in the UMWA multiemployer health care system before 1974 helped to foster an expectation of lifetime benefits that justified Congress's decision to include pre-1974 signatories in the Coal Act financing scheme:

> ". . . [E]very NBCWA signatory company shared some responsibility in creating a legitimate expectation among miners of lifetime health benefits. . . . [T]he fact that plaintiffs never contractually agreed to provide lifetime benefits does not rebut the rationality of finding that they contributed to the expectation of lifetime benefits. The Coal Commission and Congress found that the promise of lifetime benefits dates back to the 1940s, even though it is not explicit in any NBCWA until 1974. Even if no such promise was made, every NBCWA contributed to the expectation

> by creating a continuous mechanism for providing UMWA multiemployer-sponsored health benefit plans. . . . Plaintiffs were part of this tradition and can rationally be said to have contributed to a reasonable expectation of lifetime health benefits."

Pet. App. 13a-14a (quoting *Davon*, 75 F.3d at 1124-25). The court's conclusion is entirely consistent with the district court decision on which Blue Diamond relies (Pet. 17), which declared, three years before passage of the Coal Act, that retirees' expectations were derived not only from the language of the NBCWAs but also from "the 25-year history of lifetime benefits prior to 1974 . . . ." *UMWA v. Nobel*, 720 F. Supp. 1169, 1178 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

Second, the court of appeals ruled that, even putting aside any issue regarding the legitimacy of UMWA retirees' expectations, Blue Diamond had contributed substantially to the liability of the 1950 and 1974 Benefit Trusts, and that therefore it was rational for Congress to include Blue Diamond in the legislative solution to the Trusts' financial difficulties. In the court's words,

> [e]ven if Blue Diamond did not specifically create the UMWA members' expectations of lifetime coverage or if those expectations were not reasonable, Congress could still impose Coal Act liability on Blue Diamond because of Blue Diamond's direct contributions to the Combined Fund's liability. . . . Blue Diamond directly contributed to the Combined Fund's liabilities by providing service credits to its former employees. . . . [A] contractual promise of lifetime benefits is not a "prerequisite" of a congressional finding that a party bears some responsibility for the expectations created by its past conduct.

Pet. App. 14a-15a (citations omitted). As Blue Diamond itself grudgingly concedes in the petition, "Blue Diamond's employment relationship with the persons receiving those

later entitlements, based in part on that past employment relationship, arguably can be said to have 'allow[ed]' those persons to become eligible for benefit entitlements at a later date, or to have 'contributed to the [Combined Fund's] eventual liability.'" Pet. 18 (brackets in original).

In short, petitioner has offered nothing new that in any way would call into question the conclusion correctly reached by both courts below and every other court that has considered the matter—Congress acted rationally in including Blue Diamond and other similarly situated employers among the group of companies that are required to finance the benefits provided by the Combined Fund.

Moreover, Blue Diamond's effort to slough off all financial responsibility for its retirees' health care and to place that entire responsibility on 1974 and later NBCWA signatories overlooks a critical point. *Every NBCWA*—not only the NBCWAs and numerous amendments that Blue Diamond signed but the several later NBCWAs, including the NBCWAs of 1974, 1978, 1981, 1984, and 1988—was effective only for a term of years. This was just as true of the NBCWAs that referred to a "Health Services card until death" as it was of the earlier agreements. After each contract was terminated, the continued provision of health care depended on the negotiation and signing of a new national collective bargaining agreement that contained such benefits.

But, as the years went by, fewer and fewer employers were willing to sign such an agreement. That is why fewer and fewer employers were carrying the burden of the UMWA Trusts and why both Congress and the Coal Commission concluded that the problem of financing retiree health care in the coal industry could not be solved through the collective bargaining process. In the absence of a legislative solution, the signatories of the 1988 NBCWA, like Blue Diamond and all of the other past NBCWA signatories, could have refused to sign a new

collective bargaining agreement in 1993 or thereafter and then claimed that they had no further obligation to fund health care for their own former employees or anyone else's.

Blue Diamond's entire argument ignores the central question that confronted Congress during its deliberations on the Coal Act: who would pay for retiree health care in the coal industry after termination of the 1988 NBCWA, and in particular who would pay for benefits for the retirees of employers like Blue Diamond, which had long since discontinued their financial support for the UMWA Trusts. It was to answer this question that Congress chose to assess Coal Act obligations based on a finding of "responsibility" derived from past employment relationships rather than past contractual promises. There was, and is, nothing irrational about that approach.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COAL ACT DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING OF PETITIONER'S PROPERTY.

The basis of petitioner's takings challenge is that it "did not participate in the creation" of the problems that led to Congress's passage of the Coal Act. Pet. 17. The court of appeals correctly rejected that claim and concluded that all three Takings Clause factors identified by this Court in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and other cases support the validity of the Coal Act. Those three factors are the economic impact of the regulation, the extent to which the regulation has interfered with distinct and reasonable investment-backed expectations, and the character of the government action. As the court of appeals said, "Blue Diamond's Takings Clause challenge to the Coal Act fares no better than did the plaintiff's challenge [to the Multiemployer Pension Plan Amendments Act] in *Connolly*." Pet. App. 19a.

With respect to the economic impact of the Coal Act, the court of appeals emphasized, relying on *Connolly*, that

the proper question is not merely "the size of the company's liability" but rather "whether the plaintiff's liability is proportionate to the plaintiff's experience with the fund at issue." Pet. App. 19a. Here, the court of appeals held, the proportionality requirement is clearly satisfied:

> Blue Diamond's liability is at least roughly proportional to Blue Diamond's experience with the UMWA Fund. Nearly all of the approximately 1400 living beneficiaries assigned to Blue Diamond either worked for Blue Diamond or were related to someone who worked for Blue Diamond, and Blue Diamond provided service credits to those employees. The beneficiaries assigned to Blue Diamond were assigned to Blue Diamond only after they could not be assigned to a signatory to a more recent NBCWA. And although the Coal Act requires Blue Diamond also to pay a portion of the costs for the orphan retirees, the Coal Act relates Blue Diamond's assessment for orphan retirees to Blue Diamond's experience with the UMWA Fund.

Id.

Petitioner's contention that it is an "innocent bystander" is disingenuous. Pet. 20. During the period in which petitioner was signatory to NBCWAs, it contributed to the 1950 W&R Fund and its predecessors. Petitioner's employees accumulated, based on their work for petitioner, service credits that contributed to their entitlement to retiree health benefits from the 1950 W&R Fund and, after 1974, the 1950 Benefit Trust or the 1974 Benefit Trust. Petitioner's former employees actually received benefits from the UMWA Trusts for years, even though petitioner was not contributing to those Trusts. And when, under the Coal Act, the 1950 and 1974 Benefit Trusts were merged into the Combined Fund, petitioner's former employees became Combined Fund beneficiaries by operation of law.

Petitioner cannot abdicate responsibility for the crisis that led to the passage of the Coal Act. Petitioner participated in a system that engendered legitimate expectations of lifetime benefits and, when it withdrew from the Trusts and left behind its retirees, it contributed to the financial crisis that led to the Coal Act. When petitioner ceased contributing to the 1950 W&R Fund, the cost of providing health benefits for Blue Diamond's retirees and dependents was assumed by the remaining signatories to the NBCWA. When this practice of "dumping" by former NBCWA signatories multiplied years later, the entire system was pressed to the brink of ruin. Indisputably, petitioner played a role in the development of this crisis.

In addition, the Coal Act contains provisions that are intended to lessen the economic impact on assigned operators. Indeed, the Coal Act obligations of Blue Diamond and all other assigned operators have been reduced substantially by the three $70,000,000 transfers from the UMWA 1950 Pension Plan to the Combined Fund and by the first of several annual transfers from the Abandoned Mine Reclamation Fund established under the Surface Mining Act. 26 U.S.C. § 9705; 30 U.S.C. § 1232(h). These transfers have eliminated the requirement that assigned operators like petitioner pay any unassigned beneficiaries premiums during the Combined Fund's first five fiscal years. Of course, in the absence of the Coal Act, neither petitioner nor any other assigned operator would have had any legitimate claim to benefit from any of the assets of the 1950 Pension Plan. These assets were held in trust for the exclusive benefit of the Plan's beneficiaries. Likewise, absent the Coal Act, neither petitioner nor any other assigned operator legitimately could have expected to receive any benefit from the Abandoned Mine Reclamation Fund.

Turning to the second prong of this Court's Takings Clause cases, the court of appeals correctly rejected Blue

Diamond's claim that the Coal Act improperly interferes with Blue Diamond's reasonable, investment-backed expectations. In the first place, Blue Diamond did not identify any investments that it made in alleged reliance on the discontinuation of its contractual health care obligations to its former UMWA employees. More important, as the court of appeals held, given the historical origins of the UMWA Trusts, the extensive federal regulation of the coal industry, and repeated federal intervention in coal labor disputes involving benefits issues, "Blue Diamond cannot argue that it was reasonable for Blue Diamond to believe that Congress would never intervene in the management of the UMWA Fund or its successor funds." Pet. App. 20a-21a. In the court's words,

> [t]he federal government pervasively regulates the coal mining industry, the UMWA Fund originated from a federal takeover of the nation's coal mines, and federal intervention has been required to settle strikes over benefit issues . . . . Blue Diamond argues that it expected Congress to impose the costs of "bailing out" the UMWA Fund upon the general public. Such expectations clearly were unreasonable.

Id. at 20a, 21a. In essence, Blue Diamond's argument amounts to little more than the observation that the financial obligations imposed by the Coal Act go beyond those previously undertaken by contract in the NBCWAs that Blue Diamond signed. It is well-established, however, that Congress's power to legislate is not confined by the terms of pre-existing private contracts. As this Court recently has reconfirmed,

> "[c]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts

about them." *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308 (1935).

> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.

Connolly, 475 U.S. at 223-24 (citations omitted).

Finally, with respect to the third takings factor, the character of government action, both the district court and the court of appeals likened the character of the Coal Act to the Multiemployer Pension Plan Amendments Act (MPPAA), which survived constitutional scrutiny in *Connolly* and in *Concrete Pipe & Products of California, Inc. v. Construction Laborers' Pension Trust*, 508 U.S. 602 (1993). Pet. App. 21a-22a, 37a. Like the MPPAA, the Coal Act does not physically invade petitioner's assets or permanently appropriate them for the government's own use. Rather, like the MPPAA, the statute requires payments to a private benefit fund, payments designed to protect the continuation of benefits, to strengthen the financial backing of the fund, and to forestall the potential imposition of additional burdens on the public fisc. This sort of economic regulatory action does not constitute a taking.

Petitioner nevertheless insists that the Coal Act shifted "public economic burdens onto selected private shoulders . . . ." Pet. 19. The argument is without merit. Congress had no obligation to spread the costs of the coal industry crisis to the public generally. Congress rationally and deliberately selected those entities that were directly responsible for creating the crisis in the coal industry to bear the financial onus of remedying the problem. In the district court's succinct summary, "[i]t is a coal industry problem which should be solved by the coal industry. Coal operators like Blue Diamond contributed to the problem and should be part of the solution." Pet. App. 35a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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